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No. 80-2117

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's seniority system was not bona fide within the meaning of Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 634 F. 2d 929. The opinion of the district court (Pet. App. 23a-31a) is reported at 470 F. Supp. 649. A subsequent order of the district court (Pet. App. 18a-22a) is unreported. An earlier opinion of the court of appeals (Pet. App. 32a-69a) is reported at 474 F. 2d 906. An earlier opinion of the district court (Pet. App. 70a-128a) is unofficially reported at 3 Fair Empl. Prac. Cas. 767.

JURISDICTION

The judgment of the court of appeals (Pet. App. 129a-130a) was entered on January 22, 1981. On April 2, 1981, Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 21, 1981 (Pet. App. 131a). The petition for a writ of certiorari was filed on June 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1969, the United States filed suit in the United States District Court for the Northern District of Georgia, charging that the Georgia Power Company and petitioner's predecessor unions, which were parties to collective bargaining agreements with Georgia Power, had engaged in a pattern or practice of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 74a). The government's suit was consolidated for trial with two private actions (*ibid.*).

District Judge Smith found that until 1963, Georgia Power assigned all black employees and no white employees to the jobs of laborer, porter, janitor, and maid (Pet. App. 2a, 79a). These were the lowest-paying jobs, and Georgia Power did not permit blacks to transfer to higher-paying positions (*id.* at 2a). In 1963, Georgia Power began allowing blacks to transfer to higher-paying jobs, but only if they had a high school diploma and passed a series of aptitude tests. These two requirements did not apply to other transfers within the company (*ibid.*). After 1963, Georgia Power continued to assign almost all blacks to the lowest-paying jobs; some whites were assigned to jobs as laborers but none to the other three jobs (*id.* at 82a, 84a-85a).

The collective bargaining agreements established lines of progression through which employees could advance to higher-paying jobs without loss of seniority (Pet. App. 76a). But unlike other jobs, the all-black jobs of laborer, janitor, porter and maid were not in lines of progression (*id.* at 77a-78a). As a result, black employees could advance to higher-paying jobs only by transferring to a new section and forfeiting their seniority (*ibid.*). The small number of whites assigned to the laborer job after 1963 were promoted to higher paying positions far more quickly than blacks (*id.* at

34a).[1] In 1969, a collective bargaining agreement modified the seniority system by placing the laborer job, but not the other "black" jobs, in a line of progression (*id.* at 3a).

In 1971, the district court held that Georgia Power's practices before 1963 operated to keep blacks perpetually beneath whites hired at the same time but that the operation of the seniority system after 1963 did not violate Title VII (Pet. App. 3a-4a). It also found the high school diploma requirement unlawful but the testing program lawful (*ibid.*). On appeal, the Fifth Circuit affirmed the district court's holdings on the high school diploma requirement and on Georgia Power's practices before 1963 (*id.* at 49a-51a, 63a-66a), but vacated and remanded the district court's holding on the testing program, finding that the program had not been validated (*id.* at 48a-49a). It added that if the district court found the test invalid, it should grant seniority relief "to all blacks wrongfully deprived of the opportunity to advance beyond the positions of laborer, porter, janitor, or maid by either the testing or the high school education requirements" (*id.* at 68a).

In 1974, after the court of appeals' remand, the parties entered into a consent decree which, among other things, awarded seniority on the basis of time employed by the company, not time spent in a section, to all janitors, porters and maids; to black laborers hired before 1969, when the laborer job became part of a line of progression; to black laborers hired after 1969 who were denied the opportunity to transfer by the high school diploma requirement and the testing program; and to all applicants for employment whom the company failed to hire because of their race (Pet. App. 4a-5a).

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[1] Between 1963 and the time suit was brought, whites had remained as laborers an average of three months and one week; blacks remained as laborers an average of two years and nine months (Pet. App. 34a).

2. Approximately four years later, petitioner moved to vacate this part of the final decree (Pet. App. 5a). Petitioner claimed that *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), made the award of seniority relief inequitable (Pet. App. 5a). Over the opposition of the United States and private plaintiffs, District Judge Murphy[2] agreed that the award of seniority relief in the consent decree was based on the view rejected in *Teamsters* (*id.* at 5a-6a). In response to the government's argument that *Teamsters* was inapplicable because the Georgia Power seniority system was not bona fide, the district court said (*id.* at 26a-27a):

> A "bona fide" seniority system is one which is negotiated and maintained without a discriminatory purpose. * * * There is no evidence before the Court indicating that the seniority provided for in the collective bargaining agreement * * * is not "bona fide" * * *. Indeed, the Court notes that the system * * * is not untypical * * *.

The district court accordingly granted petitioner's motion in substantial part (*id.* at 27a-28a).[3]

The court of appeals reversed. It held that although the decision in *Teamsters* was the kind of change in circumstances that could justify a modification of a final decree (Pet. App. 6a-10a), petitioner's seniority system was not bona fide (*id.* at 10a-16a). The court said that the "key to the bona fides of a seniority system that may have a discriminatory effect is the absence of purposeful discrimination" (*id.* at 10a). In inquiring into purposeful discrimination, the court said it would examine "the totality of circumstances" with

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[2]District Judge Smith had left the bench in the interim.

[3]The district court preserved seniority relief for black applicants who had been denied employment on the basis of race (Pet. App. 6a). See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

particular emphasis on four factors identified by *Teamsters* and by the Fifth Circuit's decision in *James* v. *Stockham Valves & Fittings Co.*, 559 F. 2d 310, 351-352 (5th Cir. 1977):

> These factors include: whether the seniority system operates to discourage all employees equally from transferring between seniority units; whether the seniority units are in separate bargaining units and, if so, whether that structure is rational and in conformance with industry practice; whether the seniority system had its genesis in racial discrimination; and whether the system was negotiated and has been maintained free from any illegal purpose.

Pet. App. 10a-11a. The court of appeals also noted (*id.* at 11a) that Judge Murphy's "terse" treatment of the question whether the Georgia Power system was bona fide had overlooked many of Judge Smith's findings.

The court concluded, on the basis of those findings, that Georgia Power's seniority system was not bona fide. It noted that although the system was neutral on its face—all employees lost seniority when they transferred from one section to another—"[t]his facial equality * * * was but a mask for the gross inequality beneath" (Pet. App. 12a), because with few exceptions all blacks and only blacks were assigned to jobs from which they could transfer only by giving up their seniority; whites could be promoted through lines of progression and retain their seniority (*id.* at 12a-13a, 14a). The court also reasoned (*id.* at 13a) that the seniority system was instituted "in an era of overt racial discrimination at Georgia Power" and that, by excluding the black jobs from lines of progression, the system served precisely the objectives that Georgia Power was pursuing through its overtly discriminatory hiring and assignment policies (*id.* at 13a-14a). The court concluded that this was " 'a clear pattern, unexplainable on grounds other than

raçe' " (*id.* at 16a, quoting *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)) that demonstrated, in light of all the circumstances, that Georgia Power's seniority system was not bona fide.

ARGUMENT

1. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), interpreted Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-(2)(h), to create a limited exception to Title VII for certain "neutral, legitimate seniority system[s]" (431 U.S. at 353) that would otherwise be unlawful because they perpetuate the effects of prior discrimination (*id.* at 348-356). But *Teamsters* emphasized that Section 703(h) "does not immunize all seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race * * *' " (431 U.S. at 353). The court of appeals correctly held that Georgia Power's seniority system was not bona fide, at least insofar as it excluded the jobs of laborer, porter, maid, and janitor from legitimate lines of progression.

First, the court of appeals was plainly correct in refusing to regard the seniority system as a neutral scheme that "applie[d] equally" to all employees (see *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 355). Petitioner suggests that the court reached this conclusion solely on the basis of the system's "disparate impact" on black employees (Pet. 14-15). But unlike *Teamsters* (see 431 U.S. at 356), this is not a case in which far more whites than blacks were injured by the challenged aspect of the seniority system. See also *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 275 (1979); *id.* at 281 (Stevens, J., concurring). The Georgia Power seniority system attached a special disadvantage—the inability to be promoted without losing seniority—to precisely those jobs

which the employer had ensured would be exclusively or, in the case of the laborers, predominantly black. Having ensured that blacks would occupy certain jobs, Georgia Power—and petitioner, which joined Georgia Power in sponsoring the system—cannot pretend that a seniority system which singles out those jobs is in some sense "neutral"; indeed, it is difficult to see how a system could be less neutral without being explicitly racial, and the parties to a collective bargaining agreement are unlikely to use explicitly racial language.

This factor alone may not necessarily show that the system was not bona fide, and the court of appeals did not treat it as conclusive. But the lack of neutrality at least created a strong inference of discrimination that required the sponsors of the seniority system to provide legitimate reasons for subjecting to a disability only the jobs that had been deliberately limited to black employees.

Second, the court of appeals properly considered the role of past racial discrimination by Georgia Power. Petitioner correctly suggests (Pet. 16-17) that any seniority system which perpetuates the effects of past discrimination is likely to have been adopted at a time of pervasive discrimination, so again this factor alone cannot be decisive. But in cases dealing with the definition of discriminatory purpose under the Equal Protection Clause, the Court has recognized that "a consistent pattern of official racial discrimination" or "a series of official actions taken for invidious purposes" can be strong evidence that a subsequent or contemporaneous official action was also discriminatorily motivated. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 n.14, 267 (1977). Any difficulties in imputing the motives of public officials to their successors, or to officials at a different level of government (see *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 & n.20 (1980) (plurality opinion)), are substantially diminished when the issue involves only the actions of a single pair of collective

bargaining agents over a relatively short period of time. At the very least, when an employer has unquestionably engaged in a consistent pattern of discrimination, there is no reason to presume that contemporaneous actions which severely disadvantage blacks are nondiscriminatory and taken for legitimate purposes.

In this case, in particular, the seniority system was suspect. Georgia Power adopted a variety of unlawful devices—the discriminatory hiring and transfer practices and the diploma and testing requirements—to bar blacks from all but the lowest-paying jobs. The seniority system, insofar as it excluded those jobs from lines of progression, served exactly the same purpose. It is possible that legitimate business objectives led Georgia Power to adopt policies that, coincidentally, furthered its racially discriminatory aims. But again, at the very least, the court of appeals properly required those defending the system to establish this justification.

Petitioner asserts (Pet. 15) that because Georgia Power would not have permitted blacks in any other jobs in any event, the seniority system's restrictions were not needed to enforce segregation; therefore, petitioner suggests, those restrictions must have been adopted for a legitimate, nondiscriminatory reason. This argument is specious. According to Judge Smith's findings about the seniority system (Pet. App. 77a):

> [P]romotions, competency being sufficient, * * * are based upon an employee's [job] classification seniority in the respective section of the seniority division[4] in

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[4]The "sections" were the lines of progression consisting of several jobs or, in the case of the "black" jobs, a single job; an employee could not transfer his seniority from one section to another. The "divisions" were the larger administrative units into which Georgia Power divided its operations (Pet. App. 75a-78a). Georgia Power's use of divisions is not at issue here.

> which he is employed. First preference in filling a job vacancy is given to the senior employee, competency being sufficient, in the same classification in the same section and division where the vacancy exists, requesting such transfer. If no such employee requests a * * * transfer, the vacancy is filled by the promotion of the most senior employee, competency being sufficient, in the next lower classification in the section * * * requesting such promotion.

Thus, placing black employees in lines of progression would potentially have enabled them to claim, under the collective bargaining agreement, that they were entitled to certain promotions; excluding the black jobs from lines of progression permitted Georgia Power to avoid having to promote competent black employees.

In fact, petitioner's assertion (Pet. 15) that Georgia Power was unalterably committed to segregation suggests another reason for presuming the invalidity of the seniority system. In some circumstances, collective bargaining might be expected, and presumed, to produce an agreement that furthers legitimate business and employee objectives. But, as petitioner says, Georgia Power was evidently determined to maintain its discriminatory employment practices, and while petitioner's predecessors were found not to discriminate in internal union affairs (see Pet. App. 104a), there is no showing that they ever attempted to press black employees' interests in being free from discrimination by the company. In other cases where seniority systems were challenged, the Fifth Circuit has concluded that a union "sought to bring about a nondiscriminatory [seniority] * * * system" or "opposed [discrimination] * * * through every means in [its] power." *Terrell* v. *United States Pipe & Foundry Co.*, 644 F. 2d 1112, 1121 (5th Cir. 1981). But the courts below made no such determination in this case, and

petitioner points to no evidence suggesting that the unions offered to make concessions or bargained in any other way for their black members' freedom from discrimination.[5]

Consequently, Georgia Power's seniority system must be viewed as the product of collective bargaining between an employer determined to prefer racially discriminatory practices over a rational allocation of personnel based on such factors as ability, and unions that did not resist the employer's choice. In deciding whether an institutional decision was made with discriminatory intent, the Court has always paid close attention to the process by which the decision was made; when a process that afforded a clear opportunity for deliberate discrimination yielded a result that disproportionately disadvantaged blacks, the Court has presumed a discriminatory purpose and required the party defending the result to show otherwise. See, *e.g., Castaneda* v. *Partida,* 430 U.S. 482 (1977); *Alexander* v. *Louisiana,* 405 U.S. 625, 631-632 (1972). The collective bargaining process at Georgia Power enabled the employer to carry out his determination to discriminate, and the results, of course, disproportionately affected blacks. For this reason, also, the court properly required petitioner to justify the seniority system.

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[5]Petitioner cites (Pet. 9-10) Judge Smith's general finding that there had been "no showing of any conscious intent" to discriminate on the part of petitioner's predecessor unions (Pet. App. 115a). But it is entirely possible for a discriminatory seniority system to be established over the union's opposition or—as in this case—with the unions' apparent acquiescence. The unions' culpability may be relevant to determining their liability for back pay (see, *e.g., Terrell* v. *United States Pipe & Foundry Co., supra,* 644 F. 2d at 1120-1121; *James* v. *Stockham Valves & Fittings Co., supra,* 559 F. 2d at 353-354; see generally *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-423 (1975)), but this case involves only equitable relief, which is appropriate irrespective of the unions' culpability if the seniority system was not bona fide.

Petitioner points to no evidence, and we know of none in the record, showing that Georgia Power's exclusion of the "black" jobs from lines of progression served a legitimate business purpose. Petitioner appears to acknowledge that the exclusion of the laborer's job from a line of progression before 1969 (the year in which suit was brought) served no legitimate purpose (Pet. 17 n.5). Petitioner asserts that the janitor, porter, and maid positions were "functionally unrelated to any other jobs" (*id.* at 16 n.5), but this assertion is unsubstantiated by any citation to the record. Therefore, petitioner did not overcome the strong showing that the provision of the seniority system that excluded the "black" jobs from lines of progression was adopted for a discriminatory purpose, and the court of appeals was correct in its conclusion that in this respect the seniority system was not bona fide.

2. Because the court of appeals' decision was correct, we would ordinarily ask this Court to deny the petition for a writ of certiorari. But in *Swint* v. *Pullman-Standard,* 624 F. 2d 525 (5th Cir. 1980), cert. granted, Nos. 80-1190 & 80-1193 (Apr. 20, 1981), a different panel of the Fifth Circuit applied the criteria used in this case and previously described by *Teamsters* and by *James* v. *Stockham Valves & Fittings Co., supra,* to hold that a seniority system was not bona fide. For reasons we expect to explain in a brief amicus curiae in *Pullman-Standard,* we believe that even if the Court reverses the decision in *Pullman-Standard,* the result reached by the Fifth Circuit in the present case should be allowed to stand. Nevertheless, if there is a possibility that the decision in *Pullman-Standard* will affect the present case, the Court may wish to hold this petition and dispose of it in light of the decision in *Pullman-Standard.*

CONCLUSION

The Court may wish to hold the petition for a writ of certiorari pending its decision in *Pullman-Standard* v. *Swint* and *United Steelworkers of America, AFL-CIO* v. *Swint*, Nos. 80-1190 & 80-1193. Otherwise, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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